

Scholar Advising Update
NAFSA REGION III
Tuesday, October 27, 2009

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Proposed “J-1 Subpart A” Rule

- Revises general provisions applicable to all J-1 exchange visitor programs and categories at 22 CFR 62.2(A)
- Issued 9/22/2009; Comment period ends 11/23/2009
- Incorporates EV regulatory changes since 1993
- Separate and apart from any additional regulations that needed to implement SEVIS II

Highlights of “Subpart A” Proposed Rule

Increases minimum required health insurance coverage for J-1 Exchange Visitors to:

- Medical benefit of \$200,000 per accident/illness
- Repatriation - \$25,000
- Medical Evacuation - \$50,000
- Deductible not more than \$500
- Reasonable waiting period for pre-existing conditions OK

Insurance Provider Requirements

Provider may be any of the following:

- Insurance underwriter has A.M. Best rating of “A-”, ISI rating of “A-i”, Standard & Poor’s rating of “A-”, Weiss Research rating of B+, etc.
- Backed by full-faith and credit of EV’s government
- Group insurance offered to employees or students
- Federally qualified HMO
- Federal, state or local government, or public institution
“self-insurance”
- “payment bond” from non-governmental sponsor

Appointment of RO/AROs

- Sponsor Organization or RO must have at least 3 years of experience in international exchange
- Annual criminal background check for RO and AROs:
 - Chief Operating Officer must certify completion of criminal background check
 - Use a *bona fide* background screener such as National Association of Professional Background Screeners (NAPBS)

Other Proposed Requirements in Subpart A

- Sponsors & third parties must be identified by EIN or Dun and Bradstreet number
- Requires “program validation” and collection of employment authorization info for J-2’s
- Implements management audits for Private Sector programs (e.g. au pair, summer work/travel, intern, trainee, secondary student)
- Site visit required for initial Program Designation; fee comparable to that for F-1 programs is likely

New Exchange Visitor Skills List

- Effective date is June 28, 2009
- EV's entering prior to 6/28/2009 governed by 1997 skills if country remains on the 2009 list
- If country was removed from 2009 list, EV arriving prior to 6/28/2009 is retroactively "not subject" to 212(e)
- Removal of specific skill, but not country, from 2009 list does not remove subjectivity retroactively

New Coding System

- The 2009 Skills List uses Classification of Instructional Programs Codes (CIP 2000)
- CIP 2000 codes are also used in SEVIS

Handy Skills List Resources

DOS Skills List – Select by Country:

[Http://exchanges.state.gov/jexchanges/visitors/waivers.html](http://exchanges.state.gov/jexchanges/visitors/waivers.html)

DOS 1997 Skills List:

http://www.travel.state.gov/pdf/2007_Exchange_Skills_List.pdf

NAFSA Version – Searchable by Country or
Skills List Category

http://www.nafsa.org/uploadedFiles/2009_revised_exchange.pdf?n=2895

Countries on the 2009 Skills List

Per 74 FR 20107 (4/30/09) (AILA InfoNet Doc. No. 09042964)

The following countries are on the skills list:
Please note all new countries to the list are in red.

- Albania
- Algeria
- Argentina
- Armenia
- Bahrain
- Bangladesh
- Belize
- Benin
- Bolivia
- Brazil
- Burkina Faso [formerly Upper Volta]
- Burma [formerly Myanmar]
- Cambodia
- Cameroon
- Cape Verde
- Chile
- China—Mainland
- Colombia
- Congo (Kinshasa) [Democratic Republic of the Congo, formerly Zaire]
- Costa Rica
- Djibouti
- Dominican Republic
- East Timor
- Ecuador
- El Salvador
- Eritrea
- Ethiopia
- Fiji
- Gabon
- Gambia
- Georgia
- Ghana
- Guatemala
- Guyana
- Haiti
- Honduras
- India
- Indonesia
- Jamaica
- Kazakhstan
- Kenya
- Kosovo
- Laos
- Lebanon
- Liberia
- Malawi
- Malaysia
- Mali
- Mauritania
- Mauritius
- Montenegro
- Mozambique
- Namibia
- Nepal
- Nicaragua
- Niger
- Nigeria
- Oman
- Palestinian Authority (Gaza and West Bank)
- Paraguay
- Peru
- Philippines
- Romania
- Rwanda
- Saudi Arabia
- Senegal
- South Africa
- South Korea
- Sri Lanka
- Swaziland
- Tajikistan
- Tanzania
- Thailand
- Togo
- Tonga
- Trinidad and Tobago
- Turkey
- United Arab Emirates
- Uruguay
- Venezuela
- Yemen
- Zambia

Countries No Longer on Skills List

Per comparison of 74 FR 20107 (4/30/09) and 62 FR 2447 (1/16/97)

Citizens of the following countries are no longer subject to the foreign residence requirement based on the Skills List:

- Afghanistan
- Azerbaijan
- Bahamas
- Botswana
- Burundi
- Central African Republic
- Chad
- Cote d'Ivoire
- Croatia
- Czech Republic (removed 12/24/1997)
- Equatorial Guinea
- Guinea
- Guinea-Bissau
- Hungary
- Jordan
- Kuwait
- Lesotho
- Macedonia
- Madagascar
- Malta
- Morocco
- Pakistan
- Panama
- Papua New Guinea
- Poland
- Qatar
- Sierra Leone
- Singapore
- Somalia
- Sudan
- Tunisia
- Uganda
- Western Samoa
- Zimbabwe

Trainee Category

22 CFR 62.22

- Interim Final Rule effective July 19, 2007
- Must have *received* post-secondary degree or professional certificate
- 12 months experience in a related field or five years experience in the field of the training
- Sponsor must prepare detailed training plan documented on DS-2007
- Limited to 18 months or less

“Intern” Category for Private Sector Entities-- 22 CFR 62.22

- Created 6/19/2007 by amending 22 CFR 62.22 (72 FR 33669)
- Allows private sector J Program to offer internships to:
 - Students enrolled in degree program at foreign post-secondary institution
 - Recent graduates (within 12 months) of foreign post-secondary degree program
 - No experience required

“Student Intern” Category

22 CFR 62.23(i)

- Final rule effective July 21, 2008
- Sub-category under “College and University Students”
- SEVIS functionality available 2/20/2009
- Programs designated for College and University Student category automatically eligible
- Must complete DS-2007 and meet all requirements
- Must be enrolled in foreign post secondary institution
- Must return to foreign university to complete degree
- Duration of 12 months, maximum

Selection Criteria for Trainee/Intern/ Student Intern

1. Verifiable English language skills appropriate for activity
2. Document academic qualifications and experience
3. Document current foreign univ. enrollment or graduation within 12 months
4. Completed and signed DS -7002 detailing internship is in place before DS-2019 is issued
5. Proof of sufficient financial resources
6. Trainee/Intern will be exposed to information and techniques that do not duplicate prior work experience or training

Additional Criteria for Student Intern Selection

- Must be student in good standing, enrolled in and pursuing a degree in a foreign accredited post-secondary institution
- Primary objective is not employment or to provide services to employer
- Must intend to return to home institution to receive degree

Trainee/Intern/Student Intern Sponsor Obligations

- Ensure appropriate selection, placement, orientation, supervision, & evaluation
- Be available to facilitate and counsel
- Ensure balance between learning opportunity and trainee contribution to organization
- Ensure training is full-time (min 32 hours/week)
- Monitor host organizations and third parties for compliance
- Provide on-site mentoring and supervision

Trainee/Intern/Student Internship Sponsor Obligations (cont.)

- Ensure skills, knowledge, competencies gained through structured and guided activities (as described in Form DS-7002)
- Conduct end of program evaluation (6 months or less) or mid-point and end of program evaluation (12 months or longer)
- Ensure American workers are not displaced and that trainee/intern positions have educational focus

(Trainee/Intern Only: Retain all required documentation for 3 years after completion of internship/training)

Training/Internship/Student Internship

“No-No’s”

- No unskilled or casual labor
- No child- or elder care
- No clinical patient care, application of therapies, provision of medications
- No placements that could result in notoriety or disrepute
- Clerical work must be 20% or less of activity

DS-2007 Must:

- Be signed by EV and J sponsor
- State specific goals and objectives
- Detail knowledge, skills, techniques to be imparted
- Describe methods of supervision and performance evaluation
- Describe methodology of training
- Provide chronology or syllabus

Why Establish a “Trainee” Program?

- To establish that the activity is educational and primarily benefits the exchange visitor, rather than being employment that primarily benefits the employer
- To meet demand for advanced training in specific areas of specialization
- Many J-1 sponsors feel that post-secondary students don't qualify for “Research Scholar” or “Short Term Scholar” J-1 categories

Why Establish a “Student Internship” Program?

- To address the need for internships required as a component of many international post-secondary degree programs
- Many J-1 Program Sponsors consider that undergraduate students don't meet criteria to be sponsored in the “Research Scholar” and “Short Term Scholar” categories
- Existence of “Student Internship” sub-category implies that other J categories are inappropriate for practical training experiences even for graduate level students

CSC FILING UPDATE

➤ Best filing practices:

- Mark "cap exempt" notation on I-129
- File two copies of petition and all supporting documents and insert a "colored" paper request forward to KCC for notification through PIMS
- Strong academic credentials: Educational equivalency requirements
- Efficacy of academic transcripts versus diplomas
- Document current employment = 3 copies of three recent pay stubs
- Letters explaining minimum requirements, job duties and how the candidate meets these requirements are critical
- Order of documentation referencing USCIS "Helpful Hints for Filing H-1B Petitions"

RESOLVING PROBLEM CASES: 4 STEPS

➤ USCIS has created new inquiry protocols for scholar or employment-based inquiries from members of all stakeholder associations

1. First Step: Call the NCSC at 1-800-375-5283 and take note of:

- Date of your inquiry with the NCSC
- Name of ALL Customer Service Representative/officers
- Tracking identification number of the inquiry
- Summary or copy of the response from NCSC or the USCIS office

RESOLVING PROBLEM CASES: 4 STEPS

2. Second Step: Follow up with the Service Center directly via email (including details from experience with NCSC) if the issue has not been resolved after a reasonable* period of time:

- California SC: csc-ncsc-followup@dhs.gov
- Vermont SC : vsc.ncscfollowup@dhs.gov
- Nebraska SC: ils.nebraska@dhs.gov
- Texas SC: tsc.ncscfollowup@dhs.gov

* USCIS has indicated that a “reasonable period of time” depends on the inquiry based on directives and guidance from NCSC. If NCSC refused to process or refer your request without providing an explanation, you may follow up with the Service Center immediately.

RESOLVING PROBLEM CASES: 4 STEPS

4. Fourth Step: Request Case Assistance from your NAFSA Regbud through **Get Liaison Help** if an issue is urgent or the issue has still not been resolved after e-mailing the SCOPS e-mail address.

In addition, Regbuds and other NAFSA leaders report policy interpretation questions or inconsistencies between service centers through these special contacts.

Request case assistance from your NAFSA Regbud through [IssueNet: Get Liaison Help](#).

RESOLVING PROBLEM CASES: 4 STEPS

3. Third Step: Follow up with USCIS Service Center Operations (SCOPS) if the issue has still not been resolved by SC contact after a reasonable period of time (usually 14 days) via email to SCOPS. Members only email address available at the following NAFSA web link:

http://www.nafsa.org/regulatory_information.sec/uscis_service_centers-

This e-mail box is monitored by the Customer Service Portfolio Manager at SCOPS. Once the request reaches this level, HQ SCOPS intends to respond within 5 days.

Velarde Memo 5/2/09, Health Care Occupations:

- Adjudicators can consult the U.S. Bureau of Labor Statistics' Occupational Outlook Handbook (OOH) to determine whether the position being offered qualifies as a specialty occupation as defined by Section 214(i)(1) of the Immigration and Nationality Act (INA or Act), consistent with the requirements found in INA 214(i)(2).
- This memo also offers further guidance regarding procedures to submit petition on behalf of a health care practitioner needing a social security number before obtaining a license.

I-CERT Update

- Mandatory filing of LCAs through iCERT effective 6/30/2009
- Old LCA system will remain operational through June 30, 2009 (data will not migrate to new system)
- Concerning technical issues, e-mail help desk at OFLC.Portal@dol.gov
- Helpful information on NAFSA website regarding new iCERT portal

http://www.nafsa.org/regulatory_information.sec/the_icert_portal_system

- iCERT User Account Guide
- iCERT LCA User Guide

I-CERT Update

- Many Unresolved issues
 - After completing first page of iCERT LCA, you cannot delete it (click "do not submit")
 - Now possible to withdraw certified LCA through iCERT
 - Either "in process" or approved.
 - Click on "withdraw" and then indicate reason in drop down menu.
 - iCERT seems not to recognize the names of surveys other than OES (and must use DOL's version of the survey name—see User Guide)
 - Must select SOC code from menu (can't type in)
 - Some users report e-mail notice of certification not received; best to check status of case on I-CERT rather than depend on email.
 - FEIN's not recognized.

I-CERT Update

- Expect seven work day delay in LCA approval
 - No more instant approvals, at least for now
 - “ETA will process LCAs sequentially and will **usually** make a determination . . . within seven working days of the date ETA receives the LCA” [20 CFR 655.730\(b\)](#)
- Prevailing wage determinations to be “nationalized”
 - Effective January, 2010, PWDs issued by Chicago NPC
 - See details at 73 Fed. Reg. 78020-72069 (12/19/2008) (many details)
 - Initially manual, eventually electronic?
 - Same BLS OES survey data used by SWAs (your MSA)
 - PWDs valid from 90 days to one year
 - Expect delays in receiving PWDs

H-1B Furloughs and Terminations

- If an employer furloughs an H-1B worker, it must continue to pay the required wage
 - It is a violation to place an H-1B employee . . . “in nonproductive status due to a decision by the employer (based on factors such as lack of work), or . . . to fail to pay the nonimmigrant full-time wages . . . for all such nonproductive time.” **INA 212(n)(2)(C)(vii)(I)**
 - “Circumstances where wages must be paid
If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work) . . . the employer is required to pay . . . the required wage for the occupation listed on the LCA.” **655.731(c)(7)(i)**
 - Provides narrow exceptions for employee-requested/determined leave **20 CFR 655.731(c)(7)(ii)**

H-1B Furloughs, ctd.

- If employer terminates H-1B: notify USCIS, notify DOL, and offer transportation home
 - If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. **8 CFR 214.2(h)(11)(i)(A)**
 - “The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission . . . If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed . . . Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. **8 CFR 214.2(h)(4)(iii)(E)**
 - “Withdraw” LCA **20 CFR 655.750(b)(2)**

H-1B Furloughs

- If employer reduces the “hours” of H-1B worker, it usually must file an amended petition
 - “The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary . . . An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. **8 CFR 214.2(h)(11)(i)(A)**
 - USCIS (INS) guidance may be summarized as: material changes in terms or conditions of employment require amended petition

H-1B Furloughs

- If you're curious about whether DOL will penalize you for "benching" an employee or for failing to notify USCIS of the termination, see recent cases:
 - ***Administrator, Wage & Hour Div. v. Itek Consulting, Inc.* 2008-LCA-00046 (5/6/09)**
 - ALJ found employee did not need a SSN to begin work, only evidence of having applied for one, so was in employment-related nonproductive status requiring payment
 - ***Administrator, Wage & Hour Div. v. Help Foundation of Omaha, Inc. et al.* (ARB, 12/31/08)**
 - ARB found employer failed to report termination and is liable for back wages
 - But see ***Arramreddy v. IK Solutions, Inc.*, 2006-LCA-00020 (11/15/06)**
 - ALJ found that whether termination is bona fide does not turn solely on whether INS was notified

H-1B Furloughs

- Recent cases, ctd.:
 - ***Innawlli v. American Information Technology Corp.*, 04-165 (ARB 9/29/06)**
 - ARB found employer notification of INS of termination and letter to employee offering return fare insufficient since employer continued to act as though termination never occurred
 - ***Administrator, Wage & Hour Div. v. Ken Technologies, Inc.* 03-140 (ARB 11/30/04)**
 - ARB found that ALJ placed too much significance on whether INS was notified, noted termination letter, but found that employer had not effected a bona fide termination
 - ***Chelladurai v. Infinite Solutions, Inc.*, 03-072 (ARB 4/26/06)**
 - ARB found employer benched employee who was available for work when she “ported” (not when approved)
 - ***Administrator, Wage & Hour Div. v. Avenue Dental Care.*, 2006-LCA-00029 (6/28/07)**
 - ALJ addressed a variety of issues including bona fide termination

Furloughs & Terminations, ctd.

- The bottom-line:
 - If you plan to reduce the hours to be worked by an H-1B employee, file an amended petition
 - If you terminate an H-1B employee early:
 - Memorialize the termination in writing
 - Notify USCIS (“withdraw” the petition)
 - Notify DOL (“withdraw” the LCA)
 - Make a clean break – do not continue to act as if there is any kind of employment relationship
 - Advise the former employee to seek legal advice concerning immigration status, moving to new employer
 - Terminated H-1B remains in “a period of stay authorized by the attorney general” until petition expires and does not accrue unlawful presence, but is out of status after termination
 - USCIS has discretion to approve change of employer petition, primarily under 8 CFR 248.1(b)
 - Careful advice needed

Site Visits

- USCIS has begun conducting site visits to verify H1B bona fides.
- Contractors ask questions of both employer and employee which track questions on I 129.
- Cooperation is not required absent a subpoena, but is advisable in the absence of wrongdoing.
- Higher ed has been targeted.
- Objective is to combat rampant H1B fraud, eg, non existent job offer or company in order to secure quota number.

DOL Questionnaire

- A detailed questionnaire for H1B *employees* has been promulgated by the DOL. Participation is voluntary.
- Questions tend to track DOL regulations regarding wages, work location, work hours and conditions, and unauthorized deductions.
- Objective appears to be to gauge compliance with DOL regs and to root out fraud.
- The full questionnaire can be viewed at: <http://www.aila.org/content/default.aspx?docid=29915>

Labor Certifications

- Increased PERM processing times due to increased integrity activity which protects US workers and satisfy statutory responsibility.
- For current processing times, click on the “Performance Information” tab on the iCERT portal home page.
- If case is outside estimated processing time you may e-mail PLC.Atlanta@dol.gov

Labor Certifications

- New 9089 form, with better format, better questions, space to explain, drop down menus, etc, will not be available until January 2010, earliest. There have been several delays of its launch.
- Will be accessed, like the LCA currently, through the iCert portal.
- In general, iCert should give DOL greater ability to compare H and labor certification filings for same alien.

US CIS Tips on Filing Form I-140, Immigrant Petition for Alien Worker (Q & A, 6/25/09)

- ❖ Filling out part 2 of form I-140
 - Select only one visa preference category. CIS will reject the petition if part 2 is left blank or when more than one visa preference category is selected.
 - If an incorrect category is selected by mistake, call the National Customer Service Center (1-800-375-5283) immediately after receiving the receipt notice to request a change in visa classification. Requests for a change in visa preference category can not be granted in petitions that have been already adjudicated.

US CIS Tips on Filing Form I-140 (cont')

- ❖ Filing a form I-140 petition that requires a DOL approved labor certification
 - The labor certification must be submitted with the form I-140 during the 180-day validity period annotated at the bottom of every page of the labor certification by DOL.
 - Make sure the labor certification is signed by the employer, the alien, and agent/representative, if any.

US CIS Tips on Filing Form I-140 (cont')

- ❖ Outstanding Professor or Researcher Petitions
 - Provide required initial evidence and detailed supporting documents with the initial filing to avoid denial or RFE. Burden on the petitioner to establish eligibility for the legal benefit sought.
 - Identify which of the 6 criteria the alien is attempting to satisfy and the relevant evidence for each criterion.
 - Place the cover letter outlining all documentation included in petition right underneath the I-140.
 - Provide evidence that the alien has at least 3 years of teaching or research experience in the academic field.
 - Submit a copy of the actual job offer letter or contract issued to the alien; and evidence of ability to pay the proffered wage.

US CIS Tips on Filing Form I-140 (cont')

❖ Outstanding Professor or Researcher Petitions

- If documenting the alien's publications, highlight the alien's name in the relevant articles. It is not necessary to send the full copy of a dissertation, thesis, paper written by the alien or one where they have been cited. It is recommended to send a title page and the portions that cite the alien's work, and the works cited or bibliography.
- Don't just indicate the name of an award received, but also the criteria for which the award is determined.
- Reference letters should provide details: e.g, what contribution has the alien made to the field, how, why is the contribution important?

US CIS Tips on Filing Form I-140 (cont')

- ❖ Submitting a request to change employers after form I-485 is pending for 180days.
- The alien beneficiary must send a letter from the new employer specifying the job title and duties of the offered position, the education requirements, the date the alien beneficiary began or will begin employment, and the offered salary.
- The letter should be issued and signed by a person with hiring authority at the new employment.
- Provide a copy of the I-140 approval notice or receipt notice and a copy of the form I-485 receipt notice.

US CIS Tips on Filing Form I-140 (cont')

❖ Other tips

- Include the correct filing fee; attach the fee to the petition and indicate the name of the applicant in the memo field of the payment document; submit one check per application; if more than one applications is filed using a single check and any of the forms is found to be improperly filed, ALL forms will be rejected.
- See Q & A for where to mail form I-140 petition withdrawal requests and AC21 106(c) portability requests.

Premium Processing of Form I-140

Resumed on June 29, 2009

- Form I-140 in the EB-1, EB-2, and EB-3 categories may be premium processed, except for EB-1 multinational manager/ executive petitions and EB-2 in the National Interest Waiver category.
- To request premium service, file form I-907 along with \$1,000 processing fee. US CIS will approve, deny, or issue an RFE within 15 days.
- Premium process may be necessary where an approved I-140 is needed to:
 - Port to a new employer after I-485 is pending for 180 days.
 - Apply for H-1B extension beyond the 6th year in 3 year increments for alien affected by per country limitations.
 - To extend EAD for 2 years where an I-485 is pending.